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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 251

LEON GRADSKY,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER

MILTON E. GRUSMARK, ESQ.
407 Lincoln Road
Miami Beach, Florida
Attorney for Petitioner.

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ARGUMENT

In support of its contention that the evidence showed a single conspiracy, the Government relies upon the fact that LEON GRADSKY received money from both National Auto Brokers and Inter-City Finance. The money received from Inter-City Finance was for salary. The Government offered no proof that the monies received from LEON GRADSKY

from National Auto Brokers were in any way connected with an alleged scheme or that the money was not for valuable consideration. The evidence only reflects that HARRY HICKS and NORMAN GRADSKY prepared "fictitious paper". This was not a fraud against Inter-City's investors as alleged in the indictment, but was a fraud perpetrated against Inter-City itself. No evidence exists to the contrary.

The fact that misrepresentations may have been made to investors of Inter-City does not necessarily create the inference that Inter-City was working with National Auto in one unified scheme. The evidence as a whole, reflects the contrary.

Inter-City was organized to operate as a factoring concern and could have purchased small loan accounts receivable, bearing interest of three (3%) per cent per month.

The overwhelming weight of the evidence supports the above contention and the Court's failure to order a severance, constitutes plain error. *U. S.* vs. *Goss*, 329 *Fed. 2d 18.*

The only testimony indicating that LEON GRADSKY received any funds from National, is the testimony of Mr. Callahan, the S. E. C. accountant. His statement derived only from hearsay evidence received more than two (2) years after the termination of the alleged conspiracy.

The full import of Mr. Callahan's sworn statement goes far beyond merely asserting that LEON GRADSKY received money from National Auto Brokers. This statement infers to the Jury that LEON GRADSKY employed a sureptitious device for obtaining money from National Auto Brokers.

This error cannot be discarded because the record is voluminous, or because other evidence may exist to the effect that LEON GRADSKY may have received other monies. The other monies received could be accounted for, since LEON GRADSKY was employed by Inter-City Finance Corporation, and did receive a salary.

The prosecution cannot eliminate error by creating a voluminous record.

The Charges to the Jury

The Court's charge to the Jury (R. 705-739), consists of over 7,000 printed words, and is contained in 35 pages of the Transcript. Certainly the slight reference to the phrase, "To the exclusion of every reasonable hypothesis of innocence", cannot be considered as an adequate instruction on this point.

This phrase in context does not advise the Jury that if the evidence against LEON GRADSKY is circumstantial, then the degree of evidence required to convict is greater than where the evidence is direct.

With respect to LEON GRADSKY, the evidence presented at the Trial was only circumstantial. No evidence was presented which directly proved that LEON conspired to commit the crimes alleged. Causing the publication of newspaper advertisements and receiving funds, is only circumstantial evidence.

The Hicks Statement

The Government does not dispute that the testimony of HARRY HICKS was prejudicial, nor does it attempt to explain how such testimony was related to the issues presented to the Jury.

The prejudicial effect of this testimony far exceeds its probative value. Furthermore, the statement made by NORMAN GRADSKY was not admissible against LEON GRADSKY, and the limiting instruction was warranted, but was never given.

CONCLUSION

For the reason stated in the Briefs of LEON GRADSKY, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

MILTON E. GRUSMARK, ESQ.
407 Lincoln Road
Miami Beach, Florida
Attorney for Petitioner.